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No. 89-1541

In The

Supreme Court of the United States

October Term, 1989

ELIZABETH H. DOLE, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND CF&I STEEL CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Assuming that Petitioner's interpretation regarding 29 C.F.R. § 1910.1029(g)(3) was reasonable, did the Tenth Circuit Court of Appeals err by deferring to the Occupational Health and Safety Review Commission's interpretation of a regulatory standard promulgated under the Occupational Safety and Health Act, where the court found that the regulatory standard in question was ambiguous and that the Commission's interpretation was reasonable?

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I. STATEMENT OF THE CASE

A. Parties and References.

Respondent, CF&I Steel Corporation[1], is a Colorado corporation incorporated under the laws of the State of Colorado and having its principal place of business in Pueblo, Colorado. Respondent shall be referred to throughout this brief as "CF&I".

Petitioner is the Secretary of Labor, Elizabeth H. Dole, and the United States Department of Labor, being represented by the Office of the Solicitor General, and shall be referred to throughout this brief as either Petitioner or Secretary.

References to the record or opinions below are made by indication of the page number contained in the Appendix portion of Petitioner's Petition for Writ of Certiorari (e.g., App. 1a).

B. The Occupational Safety and Health Act of 1970.

In 1970, Congress enacted the Occupational Safety and Health Act ("The Act"), 29 U.S.C. § 651 *et seq.*, to

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[1] In accordance with Supreme Court Rule 29.1, Respondent informs this Court that there are, at the present time, no parent companies of the Respondent; however, the following are subsidiaries of CF&I: Albuquerque Metals Company; CF&I Fabricators of Colorado, Inc.; CF&I Fabricators of Utah, Inc.; Colorado and Utah Land Company; The Colorado and Wyoming Railway Company; Denver Metals Company; The Fountain Sand & Gravel Company; Kansas Metals Company; Pueblo Metals Company; and Pueblo Railroad Service Company.

govern health and safety conditions in the workplace. While The Act delegated certain administrative functions to the Secretary of Labor, such as the promulgating of regulatory standards,[2] The Act also created an adjudicatory body known as the Occupational Safety and Health Review Commission ("Commission"). The Commission was composed of persons appointed by the President who were specially qualified by reason of training, education and experience to carry out the delegated functions of the Commission. 29 U.S.C. § 661(a). Congress' intention was that the Commission act in an adjudicatory capacity over challenged citations issued by the Secretary, 29 U.S.C. § 659(c); and further, that the Commission function as an autonomous, independent and quasi-judicial body, separate and distinct from the Secretary. See S. 2193, 91st Cong., 1st Sess. Section 6 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 462, 465 (1971) ("*Legislative History*"). This elaborate statutory scheme created a quasi-judicial body empowered to "affirm, modify or vacate" citations issued by the Secretary, 29 U.S.C. § 659(c); and the Commission was designed specifically to review the Secretary's actions in order to alleviate business concerns that the combining of prosecutorial and adjudicatory functions might produce biased decisions by the Secretary. See *Legislative History*.

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[2] 29 U.S.C. § 655 specifically enumerates the rulemaking procedures which the Secretary must follow in promulgating regulatory standards. These procedures require, among other things, publication of the proposed rule and an opportunity to submit written data, comments or objections.

The procedures for the issuance of a citation and the subsequent proceedings are very specific under The Act, and indicate the adjudicatory powers given to the Commission. When the Secretary believes, after investigation or inspection, that an employer has violated a regulatory standard, a citation is issued by the Secretary. 29 U.S.C. § 658(a). The Act requires that the citation describe with particularity the nature of the violation, including a reference to the specific provision of the regulatory standard alleged to have been violated. 29 U.S.C. § 658(a). The citation must also fix a reasonable time for the abatement of the alleged violation, and within a reasonable time after the issuance of the citation, the Secretary must notify the employer of the penalty, if any, proposed to be assessed.[3] 29 U.S.C. § 659. This assessment is based upon the Secretary's determination, in the first instance, of whether the alleged violation was "not serious", "serious" or "willful". See 29 U.S.C. § 659 and § 666.

If an employer wishes to contest the citation, penalty or abatement period, a notice of contest is filed with the Secretary. 29 U.S.C. § 659(c). Upon notice, the Secretary is required to advise the Commission immediately, and a hearing before an Administrative Law Judge ("ALJ") is scheduled. *Id*. At the hearing, the ALJ accepts testimony and other relevant evidence and, thereafter, issues findings of fact and conclusions with regard to the disputed

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[3] Pursuant to 29 U.S.C. § 666, the amount of a penalty is ultimately determined by the Commission, but it is proposed initially by the Secretary.

citation. See 29 U.S.C. § 659(c). The aggrieved party may then seek review of the ALJ's findings and conclusions by the Commission, which is composed of a panel of three members selected in accordance with 29 U.S.C. § 661(a). See 29 U.S.C. § 660(a). Based upon a documentary review of the ALJ's findings and conclusions, the Commission issues an order, either "affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief." 29 U.S.C. § 659(c). Review of the Commission's decision may be obtained in the appropriate United States Court of Appeals. See 29 U.S.C. § 660.

While the Commission was endowed under The Act with the complete array of adjudicatory powers and functions, the Secretary was given the responsibility of promulgating standards in accordance with the procedures enumerated in 29 U.S.C. § 655. These procedures require the normal array of rulemaking requirements entitling affected parties to proper notice and an opportunity to be heard. See *Id*. The Act further allows the Secretary to modify or revoke any occupational safety and health standard in accordance with the rulemaking procedures of The Act.[4] 29 U.S.C. § 655(b). This ability to amend

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[4] Contrary to Petitioner's contention at page 18 of its brief, the rulemaking process is not a "burdensome and time-consuming" process; but rather, it is a necessary process to ensure proper notice to affected employers with an opportunity to be heard, and further ensures that a standard will be limited to what it says and not what the Secretary would like it to say. *See Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1003 (9th Cir. 1986) (Secretary's interpretation not faithful to plain language of standard).

standards provides the Secretary with an additional avenue to correct by amendment what she may have failed to promulgate in the beginning, while at the same time affording affected persons notice of a proposed interpretation and an opportunity to be heard.

C. Pertinent Regulations.

In 1976, the Secretary promulgated a regulatory standard pertaining to the occupational exposure of employees to coke oven emissions. The standard became effective on January 20, 1977, after extensive rulemaking proceedings. 41 Fed. Reg. 46, 742-90 (1976). Among the various provisions within the standard was 29 C.F.R. § 1910.1029(g)(3) ("1029(g)(3)"), which pertained to a respiratory "program" for training and instructing employees:

> "(g) *Respiratory protection.*
>
> • • •
>
> (3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part."

The Secretary also promulgated a separate provision, 29 C.F.R. § 1910.1029(g)(4)(i) ("1029(g)(4)(i)"), pertaining to the use and proper fit of respirators:

> "(g) *Respiratory protection.*
>
> • • •
>
> (4) *Respirator usage.* (i) the employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly."

In the proceedings below, the Secretary maintained that the reference in 1029(g)(3) to "a respirator protection program in accordance with § 1910.134," incorporated all provisions of § 1910.134, including § 1910.134(e)(5) relating to the use of respirators.[5] Section 1910.134(e)(5), which was quoted and analyzed by the Tenth Circuit's opinion, specifically provides:

> "(e) *Use of respirators* . . . (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its facepiece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere."

The Secretary argued that the "fitted properly" reference contained in § 1910.134(e)(5) required an employer

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[5] The reference in 1029(g)(3) to § 1910.134 is of paramount importance to Petitioner's entire case. Petitioner argues that reference to "a program in accordance with § 1910.134" reasonably incorporates § 1910.134(e)(5) which is titled "use of respirators." However, the more reasonable interpretation, as the Commission concluded, would be that reference to a "program" was intended to incorporate the requirements of § 1910.134(b), which is specifically titled "Requirements for a minimum acceptable program." While a conclusion to this effect is not imperative to Respondent's defense in the underlying merits of this case, Petitioner's case is entirely dependent upon a finding that reference to a "program in accordance with § 1910.134" necessarily and reasonably incorporated § 1910.134(e)(5) regarding the "use of respirators."

to utilize qualitative fit testing in a test atmosphere[6] under 1029(g)(3) to ensure a proper fit.[7] The Secretary further argued that if an employee failed the qualitative fit test, an employer was required under 1029(g)(3), instead of 1029(g)(4)(i), to provide the employee with a properly fitting respirator or remove him from the workplace. See App. 39a.

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[6] There are various methods for testing a respirator to determine proper fit. One such test is a positive/negative pressure test, whereby the employee places the respirator on his face, inhales and exhales, and checks for any leakage of air along the seal. Another test is called atmospheric testing, whereby an employee wears a respirator in a room filled with noxious vapors, commonly known as "Banana Oil" vapors, and tries to detect an odor. While both tests are recognized by the applicable testing standards as acceptable tests, positive/negative pressure testing is not considered an atmospheric or qualitative test because it is not conducted necessarily in a "test atmosphere." See discussion at App. 36a-45a.

[7] The Commission rejected Petitioner's argument concluding that § 1910.134(e)(5) required use of a "test atmosphere" only for the training of employees:

> "[T]he source standard from which section 1910.134 was derived makes clear that use of a test atmosphere to determine respirator fit is not mandatory. In this case, the source standard is ANSI Z88.2-1969. Like section 1910.134(e)(5), the ANSI/source standard requires the use of a test atmosphere for the training of employees. ANSI Z88.2-1969, § 7.4. However, the ANSI source standard does not state that the employer must assure proper respirator fit during training; it also makes clear that a test atmosphere is not mandatory for determing facepiece fit." App. 42a.

It is these provisions of the standard and regulatory interpretations, together with the statutory framework of The Act, which provide the backdrop of the proceedings and holdings in this case.

D. Relevant Facts.

In 1979, the Secretary conducted an inspection of the CF&I coke oven facility located in Pueblo, Colorado. The Secretary found that CF&I had provided its employees with training and instruction on the use of respirators, and that CF&I had provided employees with a positive/negative pressure test with regard to the respirators. App. 3a. Despite these findings, the Secretary concluded that CF&I had willfully violated 1029(g)(3) for failing to institute a respiratory protection program, alleging that 28 employees had failed an atmospheric fit test and were not provided with a different respirator that would fit. App. 36a-37a. Rather than cite CF&I for a violation of 1029(g)(4)(i), the Secretary determined that the appropriate citation was for a willful violation of 1029(g)(3) and issued the following citation:

> "29 C.F.R. § 1910.1029(g)(3): The employer did not institute a respiratory program in accordance with 1910.134 of this part, in that; Respiratory Training did not provide the employees an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> (a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.

> (b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit."

Because CF&I believed that the providing of positive/negative pressure testing met the requirements of a satisfactory respiratory program, CF&I contested the Secretary's citation regarding a willful violation of 1029(g)(3). App. 77a, 78a-79a. A Notice of Contest was filed with the Secretary, and a hearing on the citation was set.

In accordance with The Act, a hearing on the contested citation was held before an ALJ. At the conclusion of the hearing, the ALJ rejected CF&I's contention that positive/negative pressure testing satisfied the requirements for a satisfactory respiratory program under 1029(g)(3). App. 79a. The ALJ concluded that 1029(g)(3), rather than 1029(g)(4)(i), required an employer to conduct atmospheric fit testing to assure that the employee's respirator was fitted properly. App. 79a-80a.

On review, the Commission disagreed with the conclusions of the ALJ. While finding that the facts pertaining to the citation were undisputed, the Commission concluded that 1029(g)(4)(i) was specifically applicable to the cited condition and, therefore, should have been cited by the Secretary instead of 1029(g)(3).[8] The Commission

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[8] The Commission specifically concluded:

> "In our opinion, Section 1910.1029(g)(4)(i) is specifically applicable to the cited condition and should have been cited by the Secretary instead of Section 1910.1029(g)(3)." App. 40a.

distinguished 1029(g)(3) as a training standard designed to instruct and train employees with regard to respirators; whereas, 1029(g)(4)(i) was specifically applicable to assuring proper respirator fit. App. 40a. The Commission reasoned that an interpretation of 1029(g)(3) requiring proper respirator fit would render 1029(g)(4)(i) superfluous and without meaning. App. 42a. The Commission further concluded that 1029(g)(3) should be interpreted to ensure that employers provided employees with proper training and instruction on the use of respirators, and that 1029(g)(4)(i) should be interpreted to pertain to the use of respirators, including proper respirator fit. App. 45a. Thus, because CF&I had implemented positive/negative pressure testing and instruction which satisfied the requirements of a proper respiratory protection program, the Commission determined that CF&I had not violated 1029(g)(3). App. 45a. In reaching its conclusion, the Commission rejected the Secretary's contention that the reference to § 1910.134 required an employer to assure proper fit of a respirator under 1029(g)(3):

> "In order to prove a violation of § 1910.134(e)(5) the Secretary must show that employees were not adequately instructed in the proper selection, use, and maintenance of respirators or were not permitted to handle the respirator under certain conditions. CF&I had a training program that included instruction in the selection and use of respirators and the avoidance of facepiece leakage. Employees were given an opportunity to handle the respirator under various conditions and to wear it in a test atmosphere under the guidance of an industrial hygienist. The fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate. We thus conclude that the Secretary failed to establish a violation of 29 C.F.R. § 1910.1029(g)(3)." App. 45a.

On appeal to the Tenth Circuit Court of Appeals, the conclusions and holding of the Commission were affirmed. In the opinion of the court, the regulations at issue were ambiguous and unclear as to whether 1029(g)(3) required atmospheric testing to ensure that respirators worn by employees fitted properly. App. 9a. The court considered and discussed the purpose and history behind The Act and the creation and functions of the Commission, ultimately concluding that when regulations are ambiguous, deference to the interpretation of the Commission is proper, insofar as the interpretation is reasonable. App. 5a-9a. The court also examined the language of the regulations and found that "the plain wording of the incorporated § 1910.134(e)(5) prescribed that atmospheric testing is mandated in the 'training' of employees." App. 10a. Thus, the court concluded that the Commission's interpretation of the regulation was reasonable, and that "if the Secretary maintains that a different result should prevail under OSHA, she should amend or clarify these regulations through the rulemaking process."[9] App. 11a.

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[9] While the court clearly determined that the Commission's interpretation of the regulatory provisions of the standard was reasonable, the Tenth Circuit expressed no opinion as to whether the Secretary's interpretation was reasonable.

II. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Contrary to Petitioner's arguments, this Court should deny the Petition for Writ of Certiorari review of the opinion of the Tenth Circuit Court of Appeals. Based upon the holding of the Tenth Circuit, Petitioner has overstated the actual issue presented by this Petition. When the issue is confined within the facts and circumstances of the regulatory provisions and limited to the actual holding of the Tenth Circuit, the issue presented is not as important as Petitioner would have this Court believe. Moreover, any decision by this Court with regard to the actual issue presented would be of limited precedential value, since deference to either the Commission's or Secretary's interpretation is not outcome determinative. Furthermore, contrary to Petitioner's claim, the opinion of the court of appeals was not erroneous.

1. The actual issue presented by the holding of the Tenth Circuit is not as broad as Petitioner would have this Court believe. In its opinion, the Tenth Circuit clearly limited the reach of its holding when it concluded:

> "We further stress that our holding not be construed as a carte blanche for the Commission to overturn settled regulatory interpretations of the Secretary. The Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. Because we find the regulations in the instant case to be ambiguous, we defer to the interpretation enunciated by the Commission, insofar as it is reasonable." App. 9a.

With this language, the court has instructed the Commission to afford the Petitioner's regulatory interpretation substantial weight. It is only when the interpretation is clearly wrong, or when the regulatory standard itself is ambiguous, that any issue regarding deference would arise. Therefore, the actual issue presented is not as broad as Petitioner contends; but rather, the issue of deference is limited to circumstances when the Secretary has promulgated an ambiguous regulatory standard, and both the Commission and Secretary have reached different, but reasonable, interpretations.

Moreover, the issues raised by the holding of the Tenth Circuit must be viewed in the factual setting from which the decision arose. As indicated by the court's decision, the issue was whether atmospheric testing was mandated by 1029(g)(3) to ensure a proper fit of a respirator. App. 2a. The court carefully scrutinized the language of the regulatory standard, as well as the interpretation given to it by the Commission. While the court concluded that the ambiguous regulatory standard was certainly subject to alternate interpretations, the court did not express an opinion as to whether the Secretary's interpretation was reasonable, or whether the Secretary's interpretation was as reasonable as the Commission's. Rather, the court deferred to the Commission's interpretation after concluding that *it* was reasonable, in light of the ambiguous regulatory standard:

> "The plain wording of the incorporated § 1910.134(e)(5) prescribes that atmospheric testing is mandated in the 'training' of employees. The Commission therefore concluded reasonably that CF&I was not required to utilize ongoing atmospheric testing to ensure the proper fit

> of each employee's respiratory. While it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language contained in 29 C.F.R. § 1910.1029, we defer to the interpretation chosen by the Commission." App. 10a - 11a.

Thus, the issue is not merely whether deference is properly owed to the Secretary over the Commission; but rather, since there has been no conclusion that the Secretary's interpretation of the regulatory standard was reasonable,[10] the issue presented is whether a reviewing circuit court properly defers under The Act to the reasonable interpretation of the Commission when interpreting an ambiguous regulatory standard. The limited holding of the Tenth Circuit's opinion, as well as the language of the ambiguous regulatory provisions of the standard at issue, limit the actual issue presented in this case.

Furthermore, the precedential value of any decision by this Court would be diminished by the fact that deference is rarely outcome determinative.[11] Contrary to the

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[10] Indeed, as CF&I has maintained throughout this case, the Secretary's interpretation that 1029(g)(3) pertains to proper use and fit of respirators is unreasonable in light of the clear language of 1029(g)(4)(i).

[11] There is no indication that deference in the present case was outcome determinative as Petitioner argues at Page 10 of its brief. As stated previously, the Tenth Circuit's opinion did not determine that the Secretary's interpretation was reasonable, but rather, the Court merely stated that an alternate interpretation could be reached. See App. 11a. Therefore, there is no basis to state that deference in the present case was outcome determinative, since the court could easily have concluded that the Secretary's interpretation of the regulatory standard was unreasonable.

Secretary's implication, "deference" does not equate to adoption. The fact that a reviewing adjudicatory body may afford deference to an agency's interpretation does not require the adjudicator to adopt the views of the agency. Indeed, the Tenth Circuit's opinion clearly instructed the Commission to afford substantial weight to the Secretary's interpretation of a regulatory standard, and to contravene only when the Secretary's interpretation was clearly wrong or in the presence of genuine ambiguity. App. 9a. Thus, deference would be outcome determinative only when the Secretary had promulgated an ambiguous regulatory standard which is subject to more than one reasonable interpretation, and the Commission had reasonably interpreted the standard in a way that produces a different outcome than the Secretary's interpretation, which also must be reasonable. There is little likelihood that such a scenario would arise with frequency, especially considering the Secretary's ability to amend and clarify ambiguous regulatory standards.

Also, a close examination of the case law cited by Petitioner in support of its claim that the circuits are severely divided actually reveals that deference is not outcome determinative under The Act, since circuit courts uniformly scrutinize and analyze the interpretation given by either the Commission or the Secretary. For example, Petitioner cites *Marshall v. Western Elec., Inc.*, 565 F.2d 240, 244 (2d Cir. 1977), for the proposition that the Second Circuit Court of Appeals always defers to the Commission; however, a cursory review of the case shows that the Second Circuit rejected the Commission's interpretation of a regulatory standard as unreasonable, and deferred to the Secretary's interpretation, finding

that "the Secretary's interpretation of the standard . . . was better calculated than the Commission's to achieve the congressional goal . . . ." *Id.* at 245. Similarly, in *Brennan v. OSHRC & Kesler*, 513 F.2d 553, 554 (10th Cir. 1975), the Tenth Circuit had deferred to the Secretary's interpretation in a prior decision, after considering the respective views of both the Secretary and the Commission, and finding that the Commission's interpretation was unsupported. *Id.* at 558. Thus, contrary to Petitioner's contention that a "deference rule" is often outcome determinative, case law indicates that the circuit courts uniformly consider both the Secretary's views and the Commission's interpretations, and after properly scrutinizing each, defer to the most reasonable interpretation under the facts and circumstances of each case.[12] Accordingly, by carefully scrutinizing the interpretation

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[12] Petitioner also cites *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-1001 (9th Cir. 1986), for the proposition that the Ninth Circuit always defers to the Commission's interpretation. In *Bechtel*, the court carefully considered the Secretary's interpretation of a regulatory standard and concluded that the Secretary's interpretation was not faithful to the plain language of the standard. *Id.* at 1003. The court then considered and agreed with the Commission's interpretation of the standard at issue.

Petitioner also cites *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978), for the proposition that the Sixth Circuit Court of Appeals always defers to the Commission's views over the Secretary's. Again, Petitioner misinforms this Court regarding the reach of the Sixth Circuit's holding. Although in a prior decision the Sixth Circuit had indicated that it would defer to the Commission's ruling, the court rejected the Commission's interpretation of a regulatory standard in *Usery*. *Id.* at 132. Thus, it is clear that circuit courts

(Continued on following page)

given by either the Secretary or the Commission, a "deference rule" would rarely, if ever, be outcome determinative.[13]

The precedential value of any decision in this case would also be limited to matters arising under The Act. As the Tenth Circuit's opinion indicates:

> "Although we hold that, under [The Act], deference is properly accorded to the regulatory interpretations of the Commission, we recognize that another result may prevail under a different statutory framework." App. 9a.

Thus, the unique statutory framework of The Act in creating the Commission and empowering it with independent and autonomous adjudicatory functions limits the precise reach of the court's holding to matters arising under The Act. This limitation, together with the previously specified limitations, severely reduces the precedential value of any decision this Court may render in the present action.

(Continued from previous page)

carefully scrutinize either interpretation, despite a "deference rule", and defer to the most reasonable interpretation under the facts and circumstances of the given case.

[13] Petitioner also cites *United Steel Workers v. Schuylkill Metals*, 828 F.2d 314 (5th Cir. 1987), in support of the proposition that a deference rule is often outcome determinative. While deference in that case may have been outcome determinative, it should be noted that deference was given to the Secretary's interpretation over that of the Commission's. The court, however, did "consider carefully both the decision of the Commission and all the arguments of the appellee's." *Id.* at 322.

Contrary to Petitioner's argument, the need for uniformity is not as great as Petitioner would like this Court to believe. Under The Act, a contested citation is determined first by an ALJ, and subsequently by the Commission. Any party aggrieved by the holding of the Commission has a direct appeal to the circuit court of appeals, thereby bypassing the lower district courts. Therefore, since the Tenth Circuit's opinion has already directed the Commission to accord substantial weight to the interpretations of the Secretary, the only alleged need for uniformity lies with the 11 circuit courts, four of which Petitioner contends support a rule of deference to the Secretary. See Petitioner's brief at p. 10. Thus, it is Petitioner's contention that there is a need to instruct seven circuit courts to defer to the Secretary's interpretation of an ambiguous regulatory standard promulgated pursuant to The Act, even though the Commission's interpretation is reasonable.[14] The need for uniformity among the circuit courts as to this limited issue is not so great as to invoke this Court's discretionary power.

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[14] Based upon the holding of the Tenth Circuit, the precedential value of a ruling by this Court would be limited to a situation where (1) an ambiguous regulatory standard has been promulgated by the Secretary under The Act; (2) there is more than one reasonable interpretation of the same standard; (3) the Commission has afforded the Secretary's interpretation substantial weight; (4) the Commission determines that the regulatory standard should be interpreted differently than the Secretary's interpretation; (5) the Commission's interpretation, although different from the Secretary's, is reasonable; and (6) the application of the Commission's interpretation would produce a different outcome than application of the Secretary's interpretation. Only under this limited factual scenario would an opinion from this Court be of any precedential value.

In sum, the specific issues in this case, which have been limited by the Tenth Circuit's opinion and clear directive to the Commission, are not as important as Petitioner argues. The limited factual context of this case limits the precedential value of any decision this Court may render. Furthermore, deference does not equate to adoption of the Secretary's views, and thus, a reviewing court's deference to either the Commission's interpretation or the Secretary's interpretation would not be outcome determinative. The importance of this issue is further diminished by consideration of the Petitioner's ability to amend and clarify any ambiguous regulatory standard.

2. Even assuming *arguendo* the importance of the issue and that the issue is as broad as Petitioner argues, the opinion of the Tenth Circuit was not erroneous.[15] Under the provisions of The Act, the Commission is empowered to affirm, modify, or vacate any citation or proposed penalty. 29 U.S.C. § 659(c). According to the legislative history of The Act, Congress intended that the Commission function and exist as an autonomous and independent adjudicatory body, endowed with the normal complement of judicial powers. See 29 U.S.C. § 661. In this manner, the Commission functions in a capacity similar to a lower district court, exercising adjudicatory

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[15] While recognizing that the merits of the case should not be addressed in a Brief in Opposition to the Petition for Writ of Certiorari, a discussion of the underlying merits of the Tenth Circuit's opinion is necessary in order to address Petitioner's argument that the opinion of the Tenth Circuit was incorrect. See p. 11 of Petitioner's Petition for Writ of Certiorari.

functions over regulatory interpretations, and being subject to review by the appropriate circuit court of appeals. See 29 U.S.C. § 660(a). Thus, just as a lower district court would accord substantial weight to an agency's interpretation of a regulation under a different statutory framework, the Tenth Circuit has directed the Commission in the present case to accord substantial weight to the regulatory interpretations of the Secretary. Similarly, however, just as a lower district court is not required to adopt the agency's interpretation of an ambiguous regulation, neither should the Commission.

Furthermore, any holding that a circuit court of appeals should always defer to the Secretary's interpretation over the Commission's would undermine the entire purpose and function of the Commission. The Commission was designed to be an adjudicator in order to preclude the Secretary from being investigator, prosecutor, judge and jury. See 29 U.S.C. § 660(a); *Legislative History*. Requiring a circuit court of appeals to defer to the Secretary's interpretation over the Commission's would eliminate the intent of Congress to make the Commission an autonomous and independent adjudicatory body, and would be paramount to ordering a district court to accord deference to a prosecutor's interpretation of a criminal statute.[16] Indeed, if a circuit court is to defer to the

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[16] While recognizing that a prosecutor does not promulgate the statutes which she prosecutes, the distinction is of no importance since the purpose of the Commission under The Act was to alleviate concerns that combining prosecutorial and adjudicatory powers in the Secretary would result in biased decisions against employers. Allowing the Secretary to

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Secretary's biased interpretation of an ambiguous regulatory standard over the impartial assessment by the Commission, such a ruling would make the Commission a mere rubber stamp of the Secretary's views, thereby frustrating Congress' intent to create an independent and autonomous adjudicatory body.

As evidenced by the present case, deference to the Secretary's interpretation of a regulatory standard over that of the Commission would create the danger of rulemaking by adjudication. The Act sets forth specifically enumerated procedures for promulgating regulatory standards. 29 U.S.C. § 651(b). These procedures afford employers, among other advantages, the customary notice and opportunity to be heard. The enumerated procedures and the statutory framework of The Act are designed to protect employers from being penalized by after-the-fact interpretations of regulatory standards which were ambiguous in the first instance. Affording deference to subsequent interpretations by the Secretary of an ambiguous regulatory standard would create a pandora's box of dangers, including circumstances similar to the present case.[17] The more appropriate approach under

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rulemake by adjudication further deprives an employer of the right to notice and an opportunity to be heard, as well as the other benefits of the rulemaking process.

[17] The present case provides a classic example of the dangers associated with deferring to the Secretary's subsequent interpretation over that of the Commission. Although 1029(g)(4)(i) specifically addresses the conduct forming the basis of the citation, the Secretary instead determined that a

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The Act is to enforce the regulatory standards by what they say and not by what the Secretary would like them to say. As the Tenth Circuit noted, if the Secretary maintains that a different result should prevail under The Act, she should amend or clarify these regulations through the rulemaking process. App. 11a.

Accordingly, the opinion of the Tenth Circuit was not erroneous, even assuming the importance of the issue as stated by Petitioner. The language and purpose of The Act would be frustrated by deferring to the Secretary's interpretations over the Commission's, especially with regard to an ambiguous regulatory standard. Deference is properly owed to the independent and autonomous adjudicatory body empowered to affirm, modify or vacate a given citation. To hold otherwise would frustrate Congress' intent behind the creation of the Commission, and allow the Petitioner to rulemake by adjudication.

3. There are several other factors which support a denial of the Petition for Writ of Certiorari. CF&I's coke oven facility is no longer operational[18] and, thus, the

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citation for willful violation of 1029(g)(3) was appropriate. Rather than attempt to amend the citation, the Secretary merely chose to "interpret" 1029(g)(3) as prohibiting the same conduct as 1029(g)(4)(i). Allowing the Secretary to make "interpretations" which transform the clear language of a regulatory standard creates the danger of depriving employers of the very purpose behind the rulemaking procedures.

[18] In December 1982, CF&I ceased operations at the coke plant which is the subject of the underlying citation. Although there have been no coke oven operations by CF&I since that

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interpretation of the regulatory standards at issue are of no importance to the health and welfare of any employees of CF&I. Furthermore, if the same circumstances were to arise in another case, the Secretary could avoid the entire discrepancy by issuing a proper citation under 1029(g)(4)(i), instead of 1029(g)(3). Thus, any intent behind the regulatory standard could be furthered by issuance of a proper citation, rather than by seeking to obtain a Court ordered rule that deference is always owed to the Secretary over the Commission. A requirement that the Secretary should promulgate unambiguous regulatory standards, or at least cite applicable existing standards, would be more appropriate than granting certiorari review of the issue stated by Petitioner.

Also, it is important to note the absence of the Commission as a responding party to the present Petition for Writ of Certiorari, despite the probable importance of the issue as alleged by Petitioner. As an arm of the agency, the Commission is permitted to respond in these proceedings only with the approval of the Office of the Solicitor General, Petitioner's counsel in this matter. See 28 U.S.C.

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date, the $10,000 penalty prevents this case from becoming moot. However, a recent profit-loss statement generated by CF&I shows that the organization faces a current, unfunded pension liability in the amount of $138 million. In the event that CF&I would be unable to make its payment for the pension liability and the $10,000 fine would be discharged in bankruptcy, the issues before this Court would be moot, since CF&I's coke oven facility has been closed and the enforcement of the regulatory standards are no longer applicable.

§ 518 (1980). Without such authorization to the Commission, CF&I has been handed the task of defending the Commission's adjudicatory role in defense of a $10,000 penalty.

The entire issue as presented by Petitioner is nothing more than a power struggle over the Secretary's bruised ego. The Tenth Circuit's opinion clearly directed the Commission to accord substantial weight to the Secretary's regulatory interpretations. Dissatisfied with "substantial weight" by the Commission to her interpretations, Petitioner seeks a ruling by this Court regarding the respective powers of the Secretary and the Commission, at the expense of an entity whose coke oven facility has not been operational since December 1982. Petitioner's persistence in this matter, knowing that CF&I's coke oven facility is no longer operational and that the regulatory provisions are no longer applicable to this situation, underscores the internal power struggle within the agency.[19]

III. CONCLUSION

Contrary to Petitioner's arguments, the actual issue presented by the opinion of the Tenth Circuit Court of

[19] Petitioner's power struggle is particularly evident given that the Secretary has never sought certiorari review on the alleged "deference rule", despite her contention that the circuit courts are severely divided on the issue. Indeed, of the four cases allegedly deferring to the Commission's interpretation, Petitioner has never sought review in this Court, even though she contends that the issue of deference is of significant importance and often outcome determinative.

Appeals is not of such importance as to invoke this Court's discretionary review. The limited precedential value of any ruling by this Court on the actual issues presented by the opinions below support a conclusion that the Petition for Writ of Certiorari should be denied. Accordingly, based upon the foregoing arguments, CF&I respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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